No. 76-1150

Supreme Court of the United States

OCTOBER TERM, 1976

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

BRIEF OF APPELLANTS

JAMES H. GOETZ
Goetz & Madden
P.O. Box 1322
Bozeman, Montana 59715
Attorney for Appellants

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BUTTE DIVISION

BRIEF OF LESTER BALDWIN, ET AL., APPELLANTS

OPINIONS BELOW

The opinion of the Three-Judge District Court (A. pp. 59-80), is reported at 417 F. Supp. 1005.

JURISDICTION

This action was instituted on June 23, 1975, pursuant to Title 42 U.S.C. §1983; Title 28 U.S.C. §1343, Title 28 U.S.C. §2281; Title 28 U.S.C. §§2201, 2202; and Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment to the United States Constitution, challenging the constitutionality of the license fee system of the State of Montana for the hunting of big game (Section 26-202.1, R.C.M., 1947). The Statutory District Court, by District Judges Russell E. Smith and William J. Jameson, filed its opinion on August 11, 1976, denying Plaintiffs' claims. Circuit Judge James Browning filed a dissenting opinion. (A. pp. 59-80).

The jurisdiction of the Supreme Court to review the decree of the Statutory District Court by direct appeal is conferred by Title 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether the Montana statutory scheme relating to big game license fees which imposes substantially higher license fees on nonresident hunters and which requires that nonresidents, but not residents, purchase a "combination" license for various species of game in order to hunt big game in Montana, denies to nonresidents their

constitutional rights guaranteed them under Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment (Equal Protection) of the United States Constitution.

2. Whether the Montana statutory scheme relating to big game license fees which imposes substantial burdens (financial and otherwise) on nonresident hunters but not on resident hunters, which cannot reasonably be justified on any cost basis, can nevertheless survive a constitutional challenge on the basis that political support of the local citizenry for the big game management program in Montana may evaporate in the absence of discrimination against nonresident hunters.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: Article IV, Section 2, United States Constitution; and the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are: Section 26-202.1, Revised Codes of Montana, 1975 version and 1976 [amended] version. The text of Section 26-202.1, R.C.M., is set forth at pp. 30-45 of the Appendix.

STATEMENT OF THE CASE

This action was filed on June 23, 1975. Plaintiffs-Appellants Carlson, Huseby, Lee and Moris are Minnesota residents who regularly hunt for big game, particularly elk, in the State of Montana. (See Depositions of Lee [pp. 12-15] and Moris [pp. 1-5, 7 and 8]).[1] Appellant Lester Baldwin is a licensed outfitter (hunting guide) in the State of Montana whose business is substantially dependent on nonresident hunters. (Tr. p. 140).

Appellants challenge the constitutionality of the following two statutory schemes relating to big game hunting embodied in Section 26-202.1, R.C.M., 1947:

1. The license fee structure which grossly discriminates against the nonresident hunter.
2. The arbitrary imposition upon nonresident hunters, but not resident hunters, of the big game "combination" license for the right to hunt certain species of big game,

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[1]By leave of the Court, Plaintiffs Moris and Lee were allowed to testify by deposition because they were unable to attend the evidentiary hearing. (Tr. p. 452).

particularly elk.[2]

Defendants-Appellees are the Fish and Game Commission of the State of Montana, the individual Fish and Game Commissioners of the State of Montana, and Wesley Woodgerd, Director of the Fish and Game Department of the State of Montana.

The contribution to Montana hunting by all citizens of the United States is substantial in terms of accessible federally-owned land on which to hunt, federally-owned wildlife habitat, financial contributions from the federal government through

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[2]In the 1975 hunting season, in order to hunt elk in Montana, the nonresident hunter was required to purchase a "combination" license ($151.00 fee) which entitled him to take one elk and two deer. The resident was not required to purchase a "combination" license, but instead could purchase a license solely for elk at a cost of $4.00. In the 1976 hunting season, in order to hunt elk in Montana, the nonresident was required to purchase a "combination" license ($225.00 fee) which entitled him to take one elk, one deer, and one black bear. The resident was not required to purchase a "combination" license in 1976, but instead could purchase a license solely for elk at a cost of $9.00.

the Pittman-Robertson Act, 16 U.S.C. 669, et seq. (Plaintiffs' Exhibits 5 and 6), and other contributions from the federal budget for general environmental enhancement. Approximately thirty percent (30%) of the land in Montana is federal land. (A. 57). A significant portion of elk habitat in Montana is on federal land. (A. 57). Approximately seventy-five percent (75%) of the elk and eighty-five percent (85%) of the bear taken in Montana are taken on federal lands. (A. 57).

Furthermore, the operating budget of the Montana Fish and Game Department is heavily dependent on contributions from nonresident sportsmen. Only about two percent (2%) of the budget of the Fish and Game Department comes from the general fund of the State of Montana. (Plaintiffs' Exhibit 1, Montana Executive Budget). The Department is heavily dependent on license fee income and particularly dependent on revenues derived from nonresident hunters and fishermen (approximately two-thirds of the Fish and Game Department's license revenue comes from nonresidents). (Tr. 34).

The challenge of Plaintiffs-Appellants is based on the privileges and immunities clause of Article IV, Section 2, of the United States Constitution and on the

equal protection clauses of the Fourteenth Amendment of the United States Constitution. (A. 27).

Plaintiffs' Complaint sought a declaratory judgment that said statutory scheme was unconstitutional, an injunction against enforcement of the statute and damages for each nonresident plaintiff who had purchased a big game license to the extent that the license fee for nonresident hunters exceeded the costs to the State of Montana "reasonably related to the additional costs of enforcement of the State Fish and Game laws and of contribution to conservation programs." (A. 29).

Plaintiffs have taken the position throughout this lawsuit that the State of Montana could, consistent with the United States Constitution, assess a higher fee for nonresident big game hunting than for residents, but that such higher fee is constitutional only to the extent that it either compensates the State for revenues expended by the State for the added enforcement burden nonresidents impose on Montana, if any; and/or, reasonably compensates the State for conservation expenditures made by the State for fish and game purposes from resident-paid taxes. See generally, Mullaney v. Anderson, 342 U.S. 415 (1952), and Toomer v.

Witsell, 334 U.S. 385 (1948).

A statutory three-Judge District Court was convened pursuant to 28 U.S.C. §2281.[3] An evidentiary hearing was held by stipulation before a single Judge and a transcript thereon prepared and submitted to the three-Judge Court.

The District Court rendered its decision on August 11, 1976, rejecting all of Plaintiffs' claims (Judge Browning, Circuit Judge, dissenting). (A. 59-80).

The majority opinion specifically agreed with Plaintiffs that the challenged license fee ratio "...cannot be justified on any basis of cost allocation." (A. 62, 63). Nevertheless, the majority opinion held that the privileges and immunities clause is inapplicable; that the challenged classifications, not touching upon a fundamental right, should be reviewed on the "rational relationship" standard; and that the State of Montana could find reasonable basis for the statutory discrimination in the possibility that the political motivation of the Montana

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[3]This statute was repealed on August 12, 1976, P.L. 94-381, 94th Cong., S. 357, but such repeal does not apply to any action commencing before that date.

citizenry to underwrite the elk management program might be destroyed if the discrimination were eliminated. (A. 68-72).

Judge Browning, in dissent, stated that the majority sustained the discrimination "...on a novel theory not suggested by the state or supported by any authority." (A. 75). He relied on Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and Cole v. Housing Authority, 435 F. 2d 807 (1st Cir., 1970), for the proposition that "A state may not employ an invidious discrimination to sustain the political viability of its programs. 415 U.S. at 266." (A. 77).

SUMMARY OF ARGUMENT

Montana's statutory scheme for big game hunting licenses violates Appellants' constitutional rights under the privileges and immunities clause (Article IV, Section 2) and the equal protection clause (Fourteenth Amendment) of the United States Constitution. Toomer v. Witsell, 334 U.S. 385 (1948), which held unconstitutional a South Carolina law which imposed drastically higher license fees on nonresident shrimpers than on resident shrimpers, is controlling here. Toomer established that a discrimination against citizens of other states is inconsistent with the privileges and immunities clause

where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states.

The Toomer case and Mullaney v. Anderson, 342 U.S. 415 (1952), held that higher state licensing fees for nonresident commercial fishermen than for residents can be justified only to the extent that such fees merely compensate the state either for any added enforcement burdens imposed by nonresidents or for any conservation expenditures from taxes which only residents pay.

The license fee structure in Montana--particularly the "combination" license requirement whereby nonresidents but not residents must purchase a license for a combination of species--cannot be justified either on the basis that it merely compensates the state for the additional enforcement burden, if any, posed by nonresidents or on the basis that it merely represents nonresident contributions to the state to match tax contributions made by residents for conservation. Indeed, the District Court, in ruling against Plaintiffs, conceded that the Montana license fee structure could not be justified on any cost basis. The District Court held, however, that the privileges and immunities clause is inapplicable because sport hunting is not a

"fundamental" right and held the discrimination valid because, without such discrimination, political support for the game management program in Montana might disappear.

The District Court erred in holding Toomer v. Witsell, supra, inapplicable on the basis that commercial rather than recreational activities were involved. This Court has recently held that strict scrutiny of statutory classifications hinging on nonresidency is necessary because the individual's right to nondiscriminatory treatment is involved and because the structural balance essential to the concept of federalism is at stake. Austin v. New Hampshire, 420 U.S. 656, 43 L. Ed. 2d 530 (1975). The present case presents an even more compelling reason for strict scrutiny to preserve the structural balance of federalism because a substantial portion of big game hunting in Montana takes place on federal lands (e.g. 75% of the elk taken by hunters in Montana are taken on federal lands).

Furthermore, the District Court erred in rejecting Plaintiffs' equal protection contention on the grounds that the Montana license fee discrimination scheme could be justified as reasonable on the supposition that political support for the elk management

program might disappear in the absence of such discrimination. The justification of a discrimination against nonresidents on such political grounds carries dangerous implications. Under such a nefarious rationalization a state might be able to discriminate against Blacks in its public school system on the supposition that a white majority might vote to close down the public schools in the absence of such discrimination. A state may not employ an invidious discrimination to sustain the political viability of its programs. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

In any case, there is no evidence on the record that political support for the game management program would evaporate in the absence of invidious discrimination against nonresidents. Thus, this rationale for the discrimination hinging on political grounds is nothing more than bald speculation on the part of two District Judges.

Furthermore, Montana's bizarre "combination" license, whereby nonresidents (but not residents) who desire to hunt elk only are compelled to purchase an assortment of other big game licenses, is so palpably capricious that it cannot be justified even under the rationale adopted by the District Court.

Finally, the ultimate holding of the

District Court--that a state may condition the right of the nonresident to hunt "upon such terms as it sees fit" is constitutionally indefensible. Such holding gives the State of Montana a "carte blanche" to develop further and even more egregious discriminatory devices aimed at restricting nonresident hunters. This holding cannot be squared with either the equal protection clause or the privileges and immunities clause. Nor can it reasonably be reconciled with the undisputed fact that a good part of the big game hunting activity in Montana is done on federal lands--lands owned by all of the people--not just the people of Montana.

ARGUMENT

I. THE MONTANA BIG GAME LICENSE FEE SYSTEM DENIES NONRESIDENTS THEIR CONSTITUTIONAL RIGHTS

A. MONTANA'S DISCRIMINATION AGAINST NONRESIDENTS VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

This case is governed by Toomer v. Witsell, 334 U.S. 385 (1948).[4] In Toomer, a South Carolina statute required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that state. The South Carolina fishery was part of a larger fishery extending from North Carolina to Florida. The shrimp were migratory.

The Court found that the effect of the statute was virtually to exclude nonresidents. The South Carolina statute was

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[4]It should be noted at the outset that two cases are pending before the Supreme Court which may have implications for the present case. Massachusetts v. Westcott, No. 75-1775, argued January 17, 1977; and, Douglas v. Seacoast Products, Inc., No. 75-1255, argued January 17, 1977.

declared unconstitutional under the privileges and immunities clause of the Constitution, Article IV, Section 2. The Court stated:

> (The privileges and immunities clause) does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. (P. 396).

The Toomer case was followed by Mullaney v. Anderson, 342 U.S. 415 (1952). In Mullaney, the Territorial Legislature of Alaska provided for the licensing of commercial fishermen in territorial waters, imposing a $5.00 license fee on resident fishermen and a $50.00 fee on nonresidents. The Supreme Court found the nonresident license fee invalid under the privileges and immunities clause, Article IV, Section 2. The Court cited with approval the holding in Toomer v. Witsell, that the state may only "charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." (At 417) (Emphasis added).

This standard, established by Toomer v. Witsell, supra, and reaffirmed in Mullaney

v. Anderson, supra,[5] is applicable to the present case. The additional burdens imposed on nonresident hunters by the State of Montana are only constitutionally valid to the extent that they either compensate

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[5]Numerous lower Court cases have reached the same result based on the privileges and immunities clause. See Edwards v. Leaver, 102 F. Supp. 698 (D. R.I., 1952)(striking as violative of privileges and immunities clause a state statute limiting commercial fishing licenses to residents); Steed v. Dodgen, 85 F. Supp. 956 (W.D. Tex., 1949)(holding unconstitutional a Texas law which assessed drastically lower license fees for shrimpers who were Texas residents as opposed to nonresidents); Russo v. Reed, 93 F. Supp. 554 (D. Me., 1950)(striking down as a denial of privileges and immunities a Maine statute which prohibited nonresidents from commercially fishing in the Maine coastal waters in the summer months); Brown v. Anderson, 202 F. Supp. 96 (D. Alaska, 1962)(striking down an Alaska statute differentiating between residents and nonresidents in granting salmon fishing licenses); Gospodonovich v. Clements, 108 F. Supp. 234 (D. La., 1953).

the State for any added enforcement burdens imposed by the presence of nonresident hunters or reimburse Montana for any conservation expenditures from taxes which only residents pay.

In Toomer, South Carolina did attempt to justify the restrictions on nonresidents as a conservation measure. That it would curb excessive trawling, its putative purpose, seemed doubtful because the statute did not limit the number of resident boats. In any event, the Court rejected the proposition that any means can be adopted to attain valid objectives finding that such proposition overlooks the purpose of the clause, which is "to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398.

South Carolina mentioned, but did not try to prove, that the fishing methods and size of boats of nonresidents, and the greater cost of enforcing laws against them, constituted a peculiar evil. The record did not bear this out. In any case, the state had other less drastic remedies--restricting types of equipment, basing fees on boat size or on the differential in enforcement costs. There was thus no

reasonable relationship between the putative dangers non-citizens posed and the severe discrimination visited upon them.

In the present case, the State of Montana has likewise attempted to justify the additional license fees and the combination license requirement for nonresidents by arguing that such devices are necessary to reimburse Montana for the extra cost of enforcement and for conservation expenditures from resident-borne taxes. The facts simply do not support this. Even the two-Judge majority, which ruled against Plaintiffs, conceded that, "with due regard to the presumption of constitutionality, we find that the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation." (A. 62).[6]

In spite of the clear inability of the state to justify the discrimination on a reasonable basis of cost allocation, the District Court found Montana's license fee scheme constitutional. The District Court found Toomer v. Witsell and the line of cases associated with Toomer inapplicable because those cases involved commercial activities while the present case presents a recreational interest (which the District

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[6]This factual ruling is correct. This issue is addressed later in this brief in Section III.

Court found not to be "fundamental") (A. 68).

The most recent interpretation by this Court of the privileges and immunities clause was in Austin v. New Hampshire, 420 U.S. 656, 43 L. Ed. 2d 530 (1975). Austin involved a New Hampshire tax which discriminated against nonresidents. This Court, recognizing the broad leeway traditionally accorded states in the formulation of classifications relating to taxes and impositions, nevertheless struck the tax down. The Austin case emphasized that, because of the paramount importance of the rights protected by the privileges and immunities clause, a rigorous standard of review would be appropriate:

> In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." (Citing cases). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See Lehnhausen v. Lake Shore Auto Parts Co.,

supra, 410 U.S., at 359.

This consideration applies equally to the protection of individual liberties, see Grosjean v. American Press Co., 297 U.S. 233 (1936), and to the maintenance of our constitutional federalism. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 164 (1954). (Emphasis added). 420 U.S. at 661, 662.

The Court further said:

Since nonresidents are not represented in the taxing State's legislative halls, cf., Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532-533 (1959) (BRENNAN, J., concurring), judicial acquiescense in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920). Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions. 420 U.S. at 662, 663. (Emphasis added).

Significantly absent from the Austin decision was any consideration of whether the Plaintiffs' activities were "fundamental" or otherwise. Rather, the focus is on the classification itself--i.e. the fact that the discrimination hinged on the fact of nonresidency.

This focus on nonresidency as a classification stems from the "special constitutional recognition" afforded the interest of proper "maintenance of our constitutional federalism." (420 U.S. at 662). Constitutional federalism relates both to the relations of the states with the national government and to the relations of the states with one another.

Against this policy backdrop underlying the privilege and immunities clause the following undisputed facts should be considered:

1. A significant portion of the elk habitat in Montana is on Federal lands. (A. 57).
2. Eighty-five percent (85%) of the bear taken in Montana are taken on Federal lands. (A. 57).
3. Seventy-five percent (75%) of the elk taken in Montana are taken on Federal lands. (A. 57).
4. The United States contributes

> a significant number of tax dollars to the State of Montana for fish and wildlife purposes--e.g. $1,105,387.00 in 1973 for wildlife habitat acquisition under the Pittman-Robertson Act, 16 U.S.C. 669, et seq. (Plaintiffs' Exhibit 6). Second only to license fees, the largest source of funds for the Montana Fish and Game Department is the Federal government. (Table VII, Report of the Wildlife Management Institute, 1971, Plaintiffs' Exhibit 6).

It simply cannot be said, under our system of constitutional federalism, where the national government makes such a significant contribution to the wildlife resource in Montana, that Montana is wholly free to condition the rights of nonresidents to hunt on whatever terms it sees fit. Yet, the District Court has so ruled--on the basis that the interests involved are recreational, not commercial, and therefore not important or significant enough to require anything but the most passing review.

The "Report to the President and to the Congress by the Public Land Law Review Commission--One Third of the Nation's Land,

June, 1970", states:

> All citizens share a common heritage in the public lands, just as they bear the common burden of maintaining, protecting, and developing these properties through their Federal tax dollars. No one should be granted a cost advantage to hunt and fish on public lands due solely to his place of residence. (P. 174) (Emphasis added).

Like Austin, the Toomer case is devoid of discussion relating to whether the interests involved were "fundamental" or otherwise. The Toomer Court emphasized the nature of the classification and whether such classification was important to accomplish the putative state purpose of conservation. The Toomer Court set forth the policy underlying the privileges and immunities clause as follows:

> The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not

restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.

> "Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those states, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." Paul v. Virginia, 8 Wall. 168, 180 (1868).

334 U.S. at 395.

This policy consideration applies to the present discriminatory practice of Montana against nonresidents. The report of the Wildlife Management Institute (1971) (Plaintiffs' Exhibit 7), states:

> Outdoor recreational uses are increasing dramatically, and there is greater tendency to restrict the nonresident as the competition for space and resource becomes more acute. Strangely enough, this reaction often is more apparent in the States having large expanses of public land, scenery, and wildlife. People who choose to reside in such States obviously relish freedom from crowding. They are possessive about abundant opportunities to hunt and fish, and they make no effort to disguise

> their dislike of nonresident sportsmen, particularly hunters. As a result, they tend to favor controlling the nonresident by imposing higher fees and quotas long before they will accept more controls over themselves. Politically, it is always easier to impose added costs and new restrictions on nonresidents because they have no voice or vote within a particular state. (pp. 12, 13). (Emphasis added).

Thus, the very values the Framers intended to protect through the privileges and immunities clause--comity among the States and a reasonably balanced federal system--are threatened by such discriminatory practices against the nonresident. The nonresident has little recourse to the voting booth or the legislative halls of Montana. Heightened scrutiny by this Court is, therefore, necessary in order to insure that constitutional values implicit in the federal system are not eroded.

The rejection by the District Court of the privileges and immunities clause, the employment by that Court of a "minimal scrutiny" test in reviewing the classifications, and particularly the reliance by the Court on the supposition that political support for game management might disappear in Montana, has resulted in a decision which is fundamentally inconsistent

with the values underlying our basic federal system. Under the District Court's ruling, Montana can condition hunting on any "terms it sees fit." This is literally an invitation to the states to close their doors to nonresidents. Rather than attempt to arrive at a reasonable constitutional solution to the problem at hand, the District Court ignored the policy behind the privileges and immunities clause and openly ruled that a state can do anything it wants regarding nonresident hunters because recreational hunting is not a "fundamental" right. The corrosive implications of that decision should not be left to stand.

The essence of the Toomer decision is that a state may not visit additional burdens upon nonresidents unless substantial reasons exist therefor. The application of Toomer cannot be avoided by focusing on the nature of the activity involved rather than the nature of the classification.

Furthermore, two state cases, one from Montana, have found classifications based on nonresidency unconstitutional when the activity involved was sport hunting rather than commercial activity. While both cases were decided on equal protection grounds rather than on privileges and immunities grounds, they nevertheless relate to the issue here. In

State v. Jack, 539 P. 2d 726 (Mont., 1975), Montana's law requiring nonresident hunters to employ local guides while hunting in Montana was found violative of the equal protection clause. In Schakel v. State, 513 P. 2d 412 (Wyo., 1973), a similar Wyoming statute was ruled unconstitutional.

For these reasons, the Montana hunting license scheme violates the privileges and immunities clause of the United States Constitution.

B. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT FORBIDS THE KIND OF ARBITRARY AND INVIDIOUS DISCRIMINATION IMPLICIT IN THE MONTANA STATUTORY SCHEME

In addition to violating the privileges and immunities clause, the Montana hunting license scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Both the nonresident big game combination license complained of and the drastically-higher license fees for nonresident hunters here in question, serve to establish two classes of hunters. The distinction between the two classes is based solely on citizenship (residency).

The practical effect of the creation of these two classes is that one class (nonresidents) is severely penalized

vis-a-vis the other class.

It is well established that the equal protection clause applies to the states in the exercise of their police powers relating to fish and game management. Takahaski v. Fish and Game Comm'n, 334 U.S. 410 (1948), established that almost thirty years ago. As noted above, the recent decisions of the Montana and Wyoming Supreme Courts have applied the Federal equal protection clause to the regulation by those states of certain aspects of recreational hunting. State v. Jack, 539 P. 2d 726 (Mont., 1975); Schakel v. State, 513 P. 2d 413 (Wyo., 1973).

The Montana Supreme Court said in State v. Jack:

> ...The statute purports to promote adherence to the game laws and respect for the environment, but no reasonable connection has been established between this goal and the legislative classification. Even assuming the existence of such a connection, its relationship to this particular purpose becomes more remote when applied to former Montana residents and non-resident land owners as defendant.(539 P. 2d at 730.)

In like manner, the state's proffered justifications of the nonresident combination license, which are discussed below, have either no connection or a connection so

remote to a legitimate governmental objective as to be wholly arbitrary and a denial of equal protection.[7]

Given the established proposition that the state's power to classify under its game laws is limited by the equal protection clause, the question becomes--what standard of review should be employed?

Strict scrutiny by this Court of the residence-based classification here involved is fully justified by this Court on two bases: (1) Important individual liberties and principles basic "to the maintenance of our constitutional federalism are involved." See, Austin v. New Hampshire, supra, 420 U.S. at 662; and, (2) Considerations much like those that have compelled the courts to declare certain other classifications

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[7]Other Courts have also applied the equal protection clause to the regulation by the states of their fish and game activities. See Pavel v. Pattison, 24 F. Supp. 915 (W.D. La., 1938)(voiding a state statute which discriminated against a nonresident's right to trap upon his land as violative of the equal protection clause); Pavel v. Richard, 28 F. Supp. 992 (W.D. La., 1928)(voiding a state statute requiring higher trapper's license fees as denying equal protection to nonresidents); Massey v. Appolonio, 387 F. Supp. 373 (D. Me., 1974).

"suspect" are in issue. Just as race is a classification on which legislators have found it easy to draw gross, stereotypical distinctions, so too is the fact of non-residence.[8] Nonresidents simply have no political control to curb abuses against them by state legislatures. Nonresidents have consistently been saddled by states with disabilities similar to Montana's restrictive licensing scheme. They are relegated to a position of political powerlessness to such a degree that they command extraordinary protection from the majoritarian political process. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

In any case, it is unnecessary to fit the present classification into any rigid category in order to trigger meaningful judicial review under the equal protection clause.[9] In the 1971 term, this Court

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[8]Cf. Grozier, "Constitutionality of Discrimination Based on Sex", 15 Boston U. L. Rev. 723, 728.

[9]See, Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv.L. R. 1. (November, 1972).

invoked the equal protection clause to void state legislation in six important cases without employing the "strict scrutiny" analysis. Reed v. Reed, 404 U.S. 71 (1971); Eisenstadt v. Baird, 405 U.S. 438 (1972); James v. Strange, 407 U.S. 465 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

More recently, other legislative classifications have been found inconsistent with equal protection of the laws without resort to the "strict scrutiny" test. Weinberger v. Wiesenfeld, 420 U.S. 636 (1973); Stanton v. Stanton, 421 U.S. 7 (1975); Califana v. Goldfarb, No. 75-699, 45 U.S.L.W. 4237, March 1, 1977. (See also, dissent of Justice Brennan in Massachusetts Board of Retirement v. Murgia, 427 U.S. at 313, 319).

It should be noted that the "special public interest" theory sometimes advanced to justify state discrimination in favor of its own citizens in matters of "privilege" as distinguished from "right", has been soundly rejected by this Court. See Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Graham v. Richardson, 403 U.S. 365 (1970).

Thus, regardless of whether sport hunting is a fundamental right and regardless of whether Montana's discrimination

against nonresidents is akin to the suspect classification doctrine, meaningful review of the classification is warranted and, if the classification is to be sustained, it should be clear that the classification is reasonably related and reasonably tailored to a legitimate state purpose. Sugarman v. Dougall, 413 U.S. 634 (1973). Certainly, the present case does not qualify for an extremely deferential, minimal standard of rationality which the Court has sometimes used to test legislation that discriminates against business interests, e.g. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

The District Court majority in fact found the Montana statutory scheme indefensible on any basis of cost allocation (which was the theory upon which Montana attempted to justify the scheme). Instead, the District Court found some rationality underlying the statute on the basis that political support for the program may evaporate in the absence of the discrimination against nonresidents. This was an improper justification under the equal protection clause and one which, if allowed to stand, could have extremely dangerous implications for the broad spectrum of cases which are decided under the equal protection clause. The political justification relied upon by

the majority below is discussed more fully in Section II of this brief.

For the foregoing reasons and for the reasons discussed in Section II, it is submitted that the Montana statutory scheme dealing with nonresident hunting violates the equal protection clause as well as the privileges and immunities clause.

C. WHATEVER THE CONTEMPORARY VALIDITY OF THE LEGAL FICTION OF OWNERSHIP OF THE GAME BY THE STATE, IT DOES NOT ABSOLVE THE STATE FROM ACTING WITHIN THE UNITED STATES CONSTITUTION

Montana argued below that it was the "owner" of the game within its borders and that therefore it was free to regulate the game as it saw fit. The Plaintiffs took the position that the "ownership" theory relating to wildlife is virtually dead and that the state's regulation of wildlife within its borders is more properly viewed as a state police power. The District Court refused to choose between the two theories finding such choice unnecessary to its holding. (A. 66).

Montana placed primary reliance on McCready v. Virginia, 94 U.S. 391 (1876) and Geer v. Connecticut, 161 U.S. 519

(1896).[10] In McCready, the Court upheld a Virginia statute prohibiting citizens of other states from planting oysters in Virginia's tidewaters. The Court declared that the state owned both the tidewaters and "the fish in them so far as they are capable of ownership while running." Accordingly, Virginia could regulate the planting or taking of oysters in those tidewaters, even to the point of excluding altogether the citizens of other states, because such a regulation "is in effect nothing more than a regulation of the use by the people of their common property." (At 395).

In Geer v. Connecticut, a defendant appealed his conviction under state law for possessing game birds with the intent to ship them out of Connecticut. The birds had been lawfully killed in Connecticut--only Geer's intent to transport them outside the state was unlawful. Geer challenged the Connecticut law as an infringement on interstate commerce. The Court upheld the Connecticut statute, concluding that the state had the "right

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[10] See generally Bean, "Law & Wildlife: An Emerging Body of Environmental Law", 7 E.L.R. 50013 (March, 1977).

to control and regulate the common property in game", which right was to be exercised "as a trust for the benefit of the people." The Court held that, as an incident to the right of control, the states could affix conditions on the taking of game. The Geer opinion, because of the broad generality of its language, came to be regarded as the bulwark of the state ownership doctrine.[11] Yet, the Geer opinion itself recognizes that state ownership power exists only "insofar as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." (161 U.S. at 528).

Taken to its extreme, as the State of Montana would try to take it, the ownership doctrine would preclude interference with state management of wildlife even where federal constitutional rights are involved. Such extension would also preclude the development of a substantial body of federal wildlife law. Yet, only four years after Geer, federal wildlife law took its first major step with passage of the

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[11] Id. at 50015.

Lacey Act of 1900.[12]

The state ownership doctrine suffered a severe setback in 1920 with the Court's landmark decision in Missouri v. Holland, 252 U.S. 416 (1920). In that case, the state of Missouri sought to restrain the United States from enforcing the Migratory Bird Treaty Act.[13] The Act in question was part of a Treaty between the United States and Great Britain (Canada) for the protection of migratory birds. The United States contended that the Treaty and its implementing legislation took precedence over any conficting state power of regulation. The Court, through Justice Holmes, disposed of Missouri's ownership argument in the following terms:

> The State...founds its claim of exclusive authority upon an assertion of title.... No doubt it is true that as between a State and its inhabitants, the State may regulate the killing and sale of such birds,

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[12] Ch. 553, 31 Stat. 187 (now codified in 18 U.S.C. §§42-44, and 16 U.S.C. §§667e and 701 (1970). See also, Bean, supra, at 50015.

[13] Ch. 128, 40 Stat. 755 (1918) (now codified in 16 U.S.C. §§703-711 [1970) as amended (Supp. IV, 1974).

> but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone, and possession is the beginning of ownership.... (252 U.S. at 434-35).

Montana's claim to ownership of big game sometimes found within its borders is likewise based upon a slender reed. The District Court found that, "the elk is migratory in the sense that it moves from the summer range to the winter range and back, and when this sort of migration occurs near the borders of Montana, the elk drift to and from Montana, Idaho, Wyoming, and Canada." (A. 59). (See, Tr. 31).

In Takahashi v. Fish and Game Comm'n, supra, California attempted to justify its restriction against aliens fishing in its marginal sea on the basis of the ownership doctrine. The Takahashi Court found the language from Missouri v. Holland, applicable, stating:

> To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is

> inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so. (334 U.S. at 421).

Likewise, in Toomer v. Witsell, supra, the state of South Carolina attempted to justify its discrimination against non-resident shrimpers on the ownership doctrine. That attempt was also rejected by the Supreme Court which stated:

> The whole ownership theory, in fact, is now generally regarded as a fiction expressive in legal shorthand of the importance to its people that a state have powers to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states. (334 U.S. at 402).

While these cases do not explicitly overrule McCready v. Virginia, it is clear that "the ownership theory was put to rest" by Toomer v. Witsell. Brown v. Anderson, 202 F. Supp. 96, 102 (D. Ala., 1962).

The Toomer case and the Takahaski case are squarely applicable to the present case because they both involve

attempts by states to justify deprivations of individual constitutional rights on the basis of the ownership doctrine. In both cases, the exercise of the state regulatory power over wildlife was found subject to constitutional limitations.

More recently, this Court faced a constitutional challenge to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§1331-1340, as amended (Supp. IV)(1971) in Kleppe v. New Mexico, 426 U.S. 529 (1976). The Court said:

> Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably, the states have broad trustee and police powers over wild animals within their jurisdictions. Toomer v. Witsell, 334 U.S. 385, 402 (1948); Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924); Geer v. Connecticut, 161 U.S. 519, 528 (1896). But as Geer v. Connecticut cautions, those powers exist only "insofar as their exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." 161 U.S. at 528. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of [wildlife] but it does not follow that its authority is exclusive of paramount powers. Missouri v. Holland, 252 U.S. 416, 434 (1920). Thus, the privileges

> and immunities clause, U.S. Const., Art. IV, Sec. 2, Cl. 1, precludes a state from imposing prohibitory license fees on nonresidents shrimping in its waters. Toomer v. Witsell, supra;.... (426 U.S. at 545).

A state does have important interests in regulating wildlife within its borders. The antiquated "ownership" doctrine however, is an inappropriate device by which to describe these state interests. The state interest in its wildlife is simply part of the general police power of the state. It has been established since Toomer and Takahashi that, whatever one chooses to call the states' interests in regulating their game, such interests may not be exercised in contravention of the United States Constitution.

The Montana case law recognizes that the state's exercise of its power over wildlife is subject to constitutional limitations. Rosenfeld v. Jackways, 67 Mont. 558; State ex rel. Visser v. Fish and Game Comm'n., 150 Mont. 525.

It is clear that the "ownership" doctrine cannot be employed to escape the application of the privileges and immunities clause and the equal protection clause of the United States Constitution.

II. THE MONTANA STATUTORY SCHEME WHICH IMPOSES SUBSTANTIAL BURDENS (FINANCIAL AND OTHERWISE) ON NONRESIDENT HUNTERS CANNOT BE JUSTIFIED CONSTITUTIONALLY ON THE BASIS THAT POLITICAL SUPPORT OF THE LOCAL CITIZENRY MAY EVAPORATE IN THE ABSENCE OF DISCRIMINATION AGAINST NONRESIDENTS

The District Court conceded that the Montana licensing scheme cannot be justified on any basis of "cost allocation." The Court, nevertheless, sustained the discrimination on the following basis:

> The State purpose is to restrict the number of hunter days. Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it. As the fee increases, the discrimination increases. A regulatory scheme based upon a pure lottery in which a limited number of hunters were chosen would be discrimination-free, but a legislature might with some rationality conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species would disappear. (A. 70-71).

Contrary to the implication carried in

the above statement by the District Court, a "pure lottery" system to select hunters is not the only alternative to the present Montana system. Appellants have never argued that Montana cannot charge a higher license fee for nonresidents. The position of Appellants is that an additional fee may be charged nonresidents to the extent that the differential can be justified on the basis of additional enforcement costs posed by nonresidents and/or reimbursement to the state for conservation expenditures paid for through taxes borne only by the citizens of the state. The overly simplistic analysis of the District Court suggests that either Montana be wholly unlimited in its ability to restrict nonresidents or that the only alternative is a national lottery system. A constitutional solution can be achieved without resorting to a "pure lottery" and its attendant consequences.

It also should be noted that Montana's "combination" license requirement which applies only to nonresidents is not separately addressed by the District Court. Even if Montana needs a device to restrict hunters, and even if it is allowable to charge nonresidents such a high fee that many cannot afford it, it does not follow that the "combination" license--i.e. the

placing of ancillary burdens on nonresidents--is a constitutionally acceptable way of achieving the goal of restricting the number of hunters.[14]

The most important fault in the analysis of the District Court, however, is its reliance on the supposition that political support for the game program might disappear in the absence of the discrimination against nonresidents. For the reasons discussed below, such basis cannot legitimately be used to justify the discrimination.

A. POLITICAL FACTORS CANNOT BE EMPLOYED TO RATIONALIZE AN OTHERWISE UNJUSTIFIABLE DISCRIMINATION

Judge Browning, in dissent, characterizes the majority's holding as follows:

> ...A state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them. (A. 77).

The dissent notes that the majority found factually untenable the state's

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[14]The issues relating to the combination license are addressed specifically in Section III of this brief.

attempt to justify the discrimination on a basis of cost allocation and states further:

> The majority does not discuss the other purposes advanced by the state to support the discrimination--implying (and I agree) that there is no reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable. (A. 74, 75).

Thus, the question is, can a discrimination, which is not reasonably justifiable on any other grounds, nevertheless be found reasonable on the basis that state political support for the program may disappear if the discrimination is eliminated?

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), involved a constitutional challenge to an Arizona statute requiring a year's residence as a condition to an indigent receiving non-emergency medical care at county expense. In that case the Court rejected an attempt to justify the discrimination on political grounds:

> Appellees express a concern that the threat of an influx of indigents would discourage "the development of modern and effective [public medical] facilities." It is suggested that whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families being attracted by the county hospital; hence the requirement is necessary for public support of that medical facility. (415 U.S. at 266).

The Court rejected this attempt to justify the discrimination stating, "[t]he state may not employ an invidious discrimination to sustain the political viability of its programs." 415 U.S. at 266 (Emphasis added).

The Supreme Court cited with approval Cole v. Housing Authority, 435 F. 2d 807, 812-813 (1st Cir., 1970), invalidating a city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that the durational residency requirement was "often the key to survival of [public] housing" because voters believed such a restriction discouraged low-income nonresidents from migrating into the area. The Court of Appeals rejected this reasoning, stating, "[t]he objective of achieving political support by discriminatory means...is not one which the constitution recognizes." 435 F. 2d at 813.

Although Memorial Hospital and Cole involved infringement of fundamental rights, they are nevertheless applicable here. Both cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental.

The implications of the majority's finding are aptly summarized by Judge Browning in dissent:

> A holding that discrimination by the state may be justified by showing that the state could rationally believe such discrimination was necessary to secure political support for a program in the public interest, would lead inevitably, if indirectly, to the conclusion that invidious discrimination can be justified by popular disapproval of equal treatment. As the court said in Cole, such a rule "would rationalize discriminatory classifications which are constitutionally impermissible." 435 F. 2d at 812 (A. 78, 79).

The Supreme Court has rejected this kind of political justification for invidious classifications. In Memorial Hospital, the Court said:

> As we observed in Shapiro [v. Thompson]... "[p]erhaps Congress could induce wider state participation in school

> construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme. See also Cole v. Housing Authority of the City of Newport, 435 F. 2d 807, 812-813 (Ca. 1, 1970). (415 U.S. at 267).

In Griffin v. County School Board, 377 U.S. 218 (1964), a county in Virginia attempted to close down the public schools in order to avoid compliance with the desegregation decisions. The Court found this attempt to close down the schools inconsistent with the Fourteenth Amendment, stating:

> ...The record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only, to ensure, through measures taken by the county and the state, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

Although the Griffin case differs factually from the present case, it has application. It demonstrates that the political

threat of the local citizenry to close down entirely public services cannot be used as a lever to avoid compliance with the Constitution. The implications of the District Court's rationale, when applied to the Griffin situation demonstrate the unsoundness of that approach. By the District Court's rationale desegregation might have been avoided in the southern states in the 1960's because the threat of the white majority to close the public schools could have served as sufficient justification for the discrimination. See Cooper v. Aaron, 358 U.S. 1.

In Palmer v. Thompson, 403 U.S. 217 (1971), the Supreme Court upheld the closure of city swimming pools in Jackson, Mississippi, finding the closure to be facially neutral (i.e. not clearly in response to decisions ordering desegregation of the swimming pools, but supported rather by fiscal reasons). Implicit in the Court's reasoning was the proposition that the majority will cannot abrogate the constitutional rights of citizens. The Court stated:

> Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. Buchanan v. Warley, 245 U.S. 60...; Cooper v. Aaron, 358 U.S. 1...; Watson v. City of Memphis, 373 U.S. 526 (1963). (403 U.S. at 226).

The ruling of the District Court in the present case is contrary to the important principle that constitutional rights are not subject to abrogation by majority will. As the Court said in West Virginia Board of Education v. Barnette 319 U.S. 624, (1942):

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. (319 U.S. at 638).

See also, Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963).

One of the disturbing consequences of the majority's ruling is that it appears impossible to limit. If political support is cognizable as a factor upon which discriminatory legislation can be found reasonable, many invidious discriminations will be allowed to stand. In Brown v. Anderson, 202 F. Supp. 96 (D. Alaska, 1962), the Court faced a challenge to an Alaska statute which allowed a state commission to close off certain waters to nonresident salmon fishermen if it appeared that there would not be adequate salmon in such waters to perpetuate the population. The state argued that the provision was reasonable in that it would possibly prevent the destitution of

residents (should the salmon fishery become depleted). Alaska argued such residents would become "a burden upon the citizens of Alaska and not on nonresidents." (202 F. Supp. at 101, 102).

The Court rejected such argument recognizing the open-ended implications inherent in such rationale:

> There is no exception in the privileges and immunities clause providing for differentiation on the basis of the general welfare of citizens of any State. If such were the case it would be possible to couch a legislative Act in such words as to regulate almost all types of endeavor on the sole basis of welfare. We cannot agree with defendants that there is any authority to avoid the effect of the privileges and immunities clause solely under the guise of avoiding economic losses to residents. The Act cannot be sustained on the basis that this is a reasonable basis for difference in application. (Id. at 102).

This is similar to the political justifications relied upon by the District Court. Virtually any discrimination could be couched in such terms that it would appear that local political support for the program would diminish in the absence of such discrimination.

The present case is a good example of the problems implicit in the District Court's analysis. It may well be popular to exclude

or severely restrict nonresident hunters from Montana. And it may be politically unpopular not to do so. Nonresidents have no influence in the State Legislature so protection of their rights through the democratic process is not possible. Yet, the very democratic process which has discriminated against the nonresident serves as the constitutional rationalization in a Court of law to justify denial of constitutional relief.

This rationale is inconsistent with the fundamental goal of our Constitution to protect minority rights. For this reason, the District Court's judgment must be reversed.

B. THERE IS NO EVIDENCE THAT POLITICAL SUPPORT FOR THE GAME PROGRAM WOULD EVAPORATE IF THE DISCRIMINATION AGAINST NONRESIDENTS IS ELIMINATED. IN THE ABSENCE OF SUCH EVIDENCE THE DISTRICT COURT'S SPECULATION IS UNWARRANTED

Aside from the impropriety of the District Court's use of political support factors to justify the discrimination, the District Court improperly speculated that political support in Montana for the game program would disappear in the absence of discrimination against nonresidents.

The District Court concluded that a legislature "might with some rationality,

conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program..." (A. 70) (Emphasis added). There was no evidence to support this supposition. Indeed, the state, in support of the challenged classifications, did not advance the theory embraced by the majority so it is not surprising that the record is barren of any evidence upon which to base such theory. As Judge Browning states in dissent:

> The majority nonetheless sustains the discrimination on a novel theory not suggested by the State or supported by any authority. (A. 75).

There are many cases in which there is clear evidence that there will be political resistance and perhaps even violence, in response to unpopular judicial decisions vindicating individual rights. This Court has firmly held that the constitutional rights of individuals may not be abrogated because unpopular with the majority. See Cooper v. Aaron, supra, p. 48. Clearly where the evidence of popular reaction is less clear, a Court cannot be allowed to speculate as to the unpopularity of a potential constitutional decision and, once it supposes that such decision will be unpopular, refuse

to make it.

Watson v. City of Memphis, 373 U.S. 526 (1963), was a desegregation case in which the defendant argued that implementation of the decision would result in tumultuous behavior and difficulty of enforcement. In rejecting such argument as a ground to avoid compliance with the Constitution, the Court pointed to the state of the record on the issue, indicating that it would not readily infer (in the absence of evidence) problems with enforcement:

> Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there has been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful....
>
> . . . .
>
> Moreover, there was no factual evidence to support the bare testimonial speculation that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand.
>
> . . . .

> More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of any of its citizens. 373 U.S. at 536-538.

Thus, the Watson case rejected as improper any reliance on factors relating to reaction of a political constituency in deciding issues involving individual constitutional rights. Apart from that however, the Watson opinion makes it very clear that a Court, in the absence of evidence, will not assume that a political reaction will be adverse and act accordingly. That is precisely what the District Court did in the present case. It speculated in an evidentiary vacuum that the Montana citizenry might refuse to support the game management program in the absence of discrimination against nonresidents.

Because the District Court rationalized the discrimination on improper factors and because there is no evidence to support the District Court's bald supposition that political support for the game management program

would evaporate in the absence of discrimination against nonresidents, the District Court's decision should be reversed.

III. THE MONTANA STATUTORY SCHEME WHICH DISCRIMINATES AGAINST NONRESIDENTS CANNOT BE JUSTIFIED ON ANY OF THE FACTS OR GROUNDS ASSERTED BY THE STATE

The District Court rejected the grounds advanced by Montana to justify the statutory hunting license scheme as either factually or logically untenable. Although the District Court was correct in that ultimate conclusion, that Court failed to address the separate issue of the constitutionality of the requirement that nonresidents, but not residents, purchase a combination license. That requirement is arbitrary and, at best, bears only a tangential relationship to game conservation. The combination license issue and the license fee differential issue are addressed below.

A. MONTANA'S IMPOSITION OF THE COMBINATION LICENSE ON NONRESIDENT HUNTERS, BUT NOT ON RESIDENT HUNTERS, CONSTITUTES A CLASSIFICATION BASED ON CITIZENSHIP AND IS UNJUSTIFIED, ARBITRARY, AND INVIDIOUS

The nonresident Plaintiffs have hunted in Montana and desire to continue to hunt in Montana. (Depos. of Lee, pp. 1-6; depos.

of Moris, pp. 4-8). They desire to hunt essentially, and almost solely, for elk. (Id.) The outfitter Plaintiff, Lester Baldwin, makes his living guiding hunters (primarily nonresidents [Tr. 141]), essentially for elk. (Tr. 142).

In order for a nonresident to hunt elk in Montana, he must first purchase a nonresident "combination" big game license.[15] In 1975, that combination license entitled the nonresident to take one elk and two deer (deer "A" tag and deer "B" tag).[16] Effective May 1, 1976, the combination license entitled the nonresident to take one elk, one deer, and one black bear.[17]

If the nonresident wishes to hunt for elk only, he nevertheless must purchase the combination license (priced at $151.00 in 1975; $225.00 presently). The resident who wishes to hunt for elk only can purchase a single license for one elk[18] (priced at $3.00 in 1975; $8.00 presently).

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[15] Section 26-202.1 [12], R.C.M., 1947.

[16] Section 26-202.1, R.C.M., 1947.

[17] Section 26-202.1 [12], R.C.M., 1947.

[18] Subject to first purchasing a conservation license for $1.00.

Thus, a classification is established by the Montana statutory scheme based on citizenship. The resident is afforded the choice of purchasing a single license for each species he wishes to hunt while the nonresident is denied that choice. There can be no doubt that this classification results in adverse economic discrimination against the nonresident hunters.

One obvious discriminatory effect is that the nonresident is compelled to pay a larger fee to cover the license for species he does not want. For instance, in the 1973 season when nonresidents were not compelled to purchase the black bear license, only 730 nonresident black and brown bear licenses were purchased. (Tr. 27). That same year, there were 19,277 nonresident combination big game licenses (elk and deer) purchased. (Tr. 28).

Yet, as the law now stands, the nonresident who wishes to hunt elk must purchase the combination license which includes black bear.

The requirement that the nonresident big game hunter purchase a combination license which includes black bear is ludicrous in light of the fact that "...the bear are usually hibernated during the regular season." (Tr. 296).

Moreover, the requirement that nonresidents purchase the combination license unconscionably fosters the wasting of game. The evidence indicates that some nonresidents, while hunting in Montana, come upon game for which they are not hunting but will shoot such game anyway, because they were forced to buy a license for such game. (Tr. 143, 144). This practice hardly comports with the goal of conserving game.

Under both the privileges and immunities clause of Article IV, Section 2 and the equal protection clause, this discriminatory classification must fall unless the classification can be justified by compelling state interests, or, at least legitimate and reasonable state interests. Therefore, the analysis must focus on what state interests, if any, are served by the classification.

Contrary to the District Court's finding that "the state purpose is to restrict the number of hunter days", the state offered numerous other justifications for the imposition of the "combination license" on nonresidents only. These reasons are summarized as follows:

1. The nonresident combination license tends to reduce the number of illegal kills. (Tr. 255).

2. Montana has a law making outfitters equally responsible for game violations of their clients; nonresidents use the services of outfitters to a greater extent than do residents; the combination license reduces the exposure of outfitters to game violations. (Tr. 239, 240).
3. The nonresident has a greater temptation than the resident to shoot game for which he does not have a license; therefore, the combination license allows him to bow to such temptation without breaking the law. (Tr. 8).
4. Nonresidents tend to engage in illegal license "pooling." The combination license frustrates that practice. (Tr. 237, 238).
5. Nonresident hunters want the combination license. (Tr. 290, 307).
6. Most residents who buy an elk license also buy some other license, therefore most residents voluntarily buy some form of combination license in any case. (Tr.394).

These offered justifications by the State of Montana are specious. For the most part they fail entirely to serve as a

reasonable basis for distinguishing between the resident and the nonresident. Aside from that, they are either factually or logically untenable. They are considered seriatim below:

(1) Whether the assertion that the combination license reduces the number of illegal kills can serve to justify the nonresident combination license

Montana argued that the requirement of the combination license reduces the number of illegal kills of game. (Tr. 255):

> Q. [Goetz] In other words, since the nonresident has a variety of licenses, if he kills a deer, for instance, he will have that license?
>
> A. [Lewis][19] Yes.
>
> . . .
>
> Q. [Goetz] So it wouldn't be an illegal kill?
>
> A. [Lewis] That's true.
>
> (Tr. 255, 256).

Obviously, if the same combination license were required of residents, it would further serve to reduce the number of illegal kills. (Tr. 256). Furthermore, if other species were added to the combination license, and the license were required, it would serve

[19]Official of the Montana Department of Fish and Game.

even more to reduce the number of illegal kills.

> Q. [Goetz] Now I assume you would also admit if you added moose to the combination license, that would reduce the number of illegal kills in Montana? (Emphasis added).
>
> A. [Lewis] That's true.
>
> Q. [Goetz] That goes both for the nonresident and the resident?
>
> A. [Lewis] Yes.
>
> (Tr. 256).

This reasoning, of course, can be carried on ad absurdum until all illegal game actively becomes legal through licensing for the activity and the only need for law enforcement activity is to ensure that every hunter is licensed. The argument that the combination license serves to reduce the number of illegal kills offers no justification for distinguishing between the resident and the nonresident in the imposition of the big game combination license.

(2) Whether the outfitters' equal responsibility justifies the nonresident combination license

Montana law makes an outfitter (hunting guide) responsible equally with his client for violations by his client of the fish and game laws.[20] Montana argued in the District

[20]Section 26-906, R.C.M., 1947.

Court that the nonresident combination license somehow is justified because of its relationship to the equal responsibility statute. Perhaps the most coherent statement of the argument is set forth in the testimony of Orville Lewis, Montana Fish and Game official (Tr. 239, 240):

> Well, of course the combination license fits into that picture quite well from the standpoint that these folks (nonresidents) are fully licensed in the field. There is not the problem of the nonresident discovering an animal for which he is not licensed and killing it. That problem is avoided. And it takes some responsibility off from the outfitter at the same time. I guess what I'm trying to say is it not only helps our law enforcement program to have a combination license but it also, I believe, helps out the outfitter in terms of his responsibility in reporting these violations. (Tr. 239, 240). (Emphasis added).

It is palpably arbitrary to penalize the nonresident hunter with higher license fees for the combination license in order to lighten the enforcement burden of the outfitter. In any case, only twenty percent (20%), at most, of nonresident hunters use the services of outfitters. (Tr. 248). It is not fair to burden all nonresident hunters with the combination license simply

because some of their number use outfitters. Conversely, some residents use the services of outfitters, although the percentage of residents using outfitters is smaller than that of nonresidents. (Tr. 23). These residents are not compelled to purchase a combination license. Thus, even assuming that there is some legitimate relationship between the combination license and the equal responsibility law, the classification is not at all appropriately tailored to such relationship.

Any relationship between the combination license requirement to nonresidents and the fostering of legitimate governmental purposes vis-a-vis assisting outfitters is so attentuated as to amount to the kind of arbitrary governmental action forbidden by the Constitution.

(3) Whether the nonresident has a greater temptation than the resident to shoot illegal game

Montana argued that the nonresident has a greater temptation to shoot illegal game; that, while the nonresident may think he wants to hunt only elk, he often times gets out in the field and sees other species and "is sometimes tempted beyond his capability." (Tr. 8). No concrete evidence was addressed to establish this greater "temptation factor" on the part of nonresidents than on the

part of residents.

Apparently, the state's position is that the combination license will insure that the nonresident hunter is licensed in the field for species that he might encounter and be tempted to shoot. However, in the 1975 season, the nonresident combination license included one elk and two deer--the deer "A" tag and the deer "B" tag. It is undisputed that the deer "B" tag is valid only in limited areas of the state--"east of central Montana." (Tr. 9). Elk, with a few minor exceptions, are only found in the mountainous regions, "west of central Montana." (Tr 9, 10). Assuming the purpose of the combination license is to insure that the nonresident who is hunting elk will also be licensed for deer in case he runs into a deer in the field, it hardly is necessary that he have a license for two deer. In any case, the second deer tag is not even valid in the areas where he will be hunting for elk.

Actually, there is evidence which indicates that the big game species most often encountered while hunting for elk, is moose. (Tr.144). If the nonresident hunter has an uncontrollable urge to blast anything he sees in the field, it would be as logical to add moose to the combination license as it is to add any other

species.

The entire argument that the nonresident hunter is less able to abide by the law and control his temptation is intolerably parochial. This same argument was made by the Montana Fish & Game Department in the recent case, State v. Jack, 539 P. 2d 726 (1975). In that case, Montana attempted to justify the requirement that nonresident hunters must be accompanied by licensed outfitters to hunt big game in most areas of Montana. Section 26-909, R.C.M., 1947. Montana argued inter alia:

> That state regulations and terrain are more likely to be obeyed and respected on the assumption that residents are more familiar with the laws and more jealous as to the maintenance of the local environment. (At 728, 729).

The Montana Supreme Court rejected these arguments and found the provision violative of equal protection. The Court stated:

> The state further contends the law fosters better protection for private landowners and more effective law enforcement. Yet the evidence completely fails to establish that more nonresidents than residents are found to be in violation of the law, or that hunters as a group are less law abiding than fishermen or other outdoor sportsmen. (P. 730). (Emphasis added).

Thus, the increased "temptation" on the part of the nonresident to shoot game illegally is not supported by the evidence. Nor, does the nonresident combination license requirement truly appear to have been developed in response to a perceived greater temptation on the part of nonresidents.

(4) Whether the nonresident combination license is justified by the asserted tendency of nonresidents to engage in license pooling

Montana also has argued that, without the combination license, a group of nonresident hunters would tend to purchase individual licenses of different types and engage in illegal license sharing. (Tr. 237, 238). Apparently, the argument is that, if each nonresident is compelled to purchase a combination license--which includes one elk, one deer, one bear--there would be less likelihood of three hunters banding together and purchasing one elk, one deer and one bear license among them and then sharing the licenses depending on which person killed which species.

There was no concrete evidence produced to indicate that this type of practice in fact happens to any appreciable extent. In any case, it is clear that residents have the same (or greater) opportunity to engage in license pooling. This is particularly true where husbands and wives are

involved. (Tr. 258). Furthermore, it was admitted that nonresidents tend to use the services of outfitters to a greater degree than residents. (Tr. 254). Since outfitters are responsible equally with their clients for game violations of their clients (Tr. 253, 254), the outfitters are a "valuable tool in enforcing the fish and game laws." (Tr. 254). Because of this, the evidence indicates that the residents might well have more opportunity on the average to violate the game laws (by license pooling or otherwise) than the nonresident.

The license "pooling" argument serves as no justification for distinguishing between the resident and the nonresident hunter in the imposition of the combination license.

(5) Whether the assertion that nonresidents want the combination license can justify its constitutionality

Montana produced two outfitters who testified that their nonresident clients wanted the nonresident combination license. (Tr. 290, 307). The fact that some nonresidents support the mandatory combination license is irrelevant to its constitutionality. Obviously, the nonresident Appellants in the present case do not want it.

Moreover, the testimony adduced by the state on that point is not credible. (Tr. 301, 302).

(6) Whether the argument that most residents voluntarily buy a combination license can justify the mandatory combination license imposed on nonresidents

Montana offered evidence that, in 1969, of the total number of residents who purchased elk licenses (72,837), ninety-seven percent (97%) also bought "some combination of other licenses" (Tr. 394, 395), so that "...even though they were not required to have the combination license" most bought "some kind of combination." (Tr. 395).

The testimony indicated only that ninety-seven percent (97%) of the residents who purchased an elk license also purchased some other license. That other license may simply have been a fishing license--or a game bird license. The mandatory combination license for nonresidents includes one elk, one deer and one black bear. Because the bear license is voluntary with residents and because bear hunting is unpopular, only a smattering of residents purchase bear licenses. (Tr. 396, 397).

Furthermore, it is much more sensible for the resident to purchase some combination of licenses. The typical resident will be in Montana for the entire hunting season--including the bird season which generally begins earlier than the big game season. The nonresident usually only has approximately

one week to hunt in Montana. (Tr. 143, 294). A wide-ranging combination license makes much less sense for the nonresident hunter than it does for the resident hunter. Yet, it is the nonresident who is compelled to purchase the combination license while the resident is not.

The constitutional challenge here is to a burden imposed on nonresidents which is not imposed on residents. The proof does not indicate that all, or even most of the residents, purchase the same combination license that is required of nonresidents. Indeed, the proof is to the contrary. Even if it were true, however, this fact would not dispose of the constitutional problem.

When all of these proffered justifications are examined, they fail. One is led inexorably to the conclusion that the real purpose behind the nonresident combination license is to gouge the nonresidents even more for the right to hunt big game in Montana. The state, apparently realizing that it could only raise nonresident hunting rates so high before the discrimination becomes too blatant, chose to do by indirection what it feared to do by direction. Indeed, this much appears to be admitted by Fish and Game official, Don Brown, who, when asked

from the point-of-view of a professtional fish and game person whether there was any justification, responded as follows:

> Q. [Goetz] But from your point of view as an expert Fish and Game person is there any justification or rationale which underlies that combination license for nonresidents? (Emphasis added).
>
> A. [Brown] In my opinion, I have accepted it in that it being both national and traditional that the nonresident makes up for a differential fee that the resident pays through other ways.
>
> (Tr 7; see also testimony of Brown, p. 8).

If the required nonresident combination license is simply a revenue-raising device, it is a crude device indeed. As noted above, it creates an incentive for the nonresident to waste game by taking game he does not particularly desire. It also does not at all appear to be tailored to additional revenue needs of the Fish and Game Department resulting from the nonresident presence. See Toomer v. Witsell, supra, p. 7.

As the Court said in Toomer:

> We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by noncitizens, as a class, and the severe discrimination practiced upon them. 334 U.S. at 399.

In the present case, any relationship between the combination license requirement imposed on nonresidents and purported governmental objectives is haphazard at best. The Federal Constitution does not permit a state, under the guise of conservation, to work out ulterior designs. Foster Packing Co. v. Haydel, 278 U.S. 1 (1928).

For these reasons, the nonresident combination big game license imposed by Montana is unconstitutional.

B. THE MAGNITUDE OF THE LICENSE FEE DIFFERENTIAL BETWEEN RESIDENTS AND NONRESIDENTS IS CONSTITUTIONALLY DISCRIMINATORY BECAUSE IT GROSSLY EXCEEDS ANY RESIDENT-BORNE TAXES FOR CONSERVATION AND ANY INCREASED ENFORCEMENT COSTS POSED BY NONRESIDENTS

Plaintiffs have challenged the magnitude of the big game license fee differential between residents and nonresidents.[21]

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[21] If the nonresident hunts for elk only he must pay $225.00 (for the combination license). In 1975, the fee was $151.00 for the nonresident. In contrast, the resident can buy a single elk license for $9.00. The resident elk license was $4.00 in 1975. Assuming residents simply purchase the full set of licenses which nonresidents must purchase under the big game combination license, the fee would be $21.00 ($12.00 in 1975). (A. 53-56).

Toomer v. Witsell, supra, and Mullaney v. Anderson, supra, p.7, establish that larger license fees for nonresidents are justifiable, but only to the extent that nonresidents pose additional enforcement burdens on the state and to the extent that state taxpayers are assessed for conservation expenditures which nonresidents do not bear.

In an apparent attempt to bring its license fee differentials within the Toomer and Mullaney rationale, the state argued that the differentials are justified both by the increased enforcement costs posed by nonresidents (per capita) and as compensation for tax expenditures for conservation borne by residents.

The District Court found that the license fee differential in Montana could not be supported on any cost basis. Don Brown, the major witness for Defendants, flatly admitted in deposition the license fee differentials in Montana are "arbitrary." (Tr. 197, 198). When asked about this at the hearing, he stated that he did not realize the meaning of the word arbitrary. (Tr. 198). When asked:

> Q. [Goetz] Well is it your testimony that these license fee differentials are justified by game management practices on a reason[ed] basis? (Tr. 199).

Mr. Brown answered:

> A. [Brown] I guess I have to answer the question that I do believe simply because I have conditioned myself over the years to live within the acts of the legislature.
>
> (Tr. 199).

Thus, the state has admitted that the license fee differentials in Montana are arbitrary. Little more need be said.

(1) The higher fees for nonresidents are not reasonably related to higher enforcement costs

In defense of higher license fees assessed nonresidents, Montana argued that the cost per capita for law enforcement is higher for nonresidents than for residents.

No systematic cost data was presented by Montana to establish this point. (Tr. 251). This is not to suggest that the burden of proof lies with Defendants on that point, but Plaintiffs made extensive efforts through pre-trial discovery to ascertain whether, indeed, there is an increased cost factor, for nonresidents and, if so, the magnitude of such factor.[22] The Supreme Court, in Mullaney v. Anderson, supra, said:

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[22] See Plaintiffs' 1st and 2nd sets of Interrogatories. See Plaintiff's depositions of Fish and Game Director, Woodgerd, and Fish and Game employees Long, Brown and Lewis.

> The Tax Commissioner relied on the higher cost of enforcing the license law against nonresident fishermen to justify the difference in fees. ...But there is no warrant for the assumption that the differential in fees bears any relation to this difference in cost, nothing to indicate that it "would merely compensate" for the added enforcement burden. Indeed, the Tax Commissioner and Deputy Enforcement Officer specifically disclaimed any knowledge of the dollar cost of enforcement.
>
> . . .
>
> In this case, respondents negatived other possible bases raised by the pleadings for the discrimination, and the one relied on by the Commissioner, higher enforcement costs, was one as to which all the facts were in his possession. Respondents sought to elicit these facts by interrogatories and cross-examination without avail. Under the circumstances we think they discharged their burden in attacking the statute. (342 U.S. at 418, 419). (Emphasis added).

The one piece of systematically-compiled evidence relating to differences in cost of enforcement between nonresidents and residents is found in Defendants' Exhibit A, pp. 11, 12. Those tables indicate that the number of violations per hunter is higher for nonresidents than for residents. It should be noted that the tables deal with numbers of apprehended violations. Numerous

"violations" of game laws occur which go unsolved. (Tr. 252). Thus, three factors must be recognized in viewing the tables dealing with violations: (1) Residents know the terrain better than nonresidents (Tr. 253) and therefore, may be more difficult to apprehend (i.e. residents may well commit as many game violations as nonresidents, but the proportion of apprehended violators may well be smaller). (2) Nonresidents use the services of outfitters to a greater extent than residents (Tr. 253). Outfitters are obligated by law to turn in their clients who violate the law (Equal Responsibility Law) (Tr. 254). Outfitters are a valuable tool in enforcing Montana's game laws (Tr. 254). Therefore, it appears that many of the apprehended violations by nonresidents are reported by outfitters and it costs the State of Montana virtually nothing for law enforcement- either to apprehend the violator or prove its case, if contested. (Tr. 254, 255). (3) Poaching, the illegal taking of a game animal, can occur at any time of year. Nonresident hunters, of course, are in the state for a short period of time. Residents have the opportunity to commit game violations the year around--and surely some do. Significantly, the tables appearing in

Defendants' Exhibit A, cover only the months of September-December (the big game hunting season). (See Tr. 260-267).

The state also argued that nonresidents tend to engage in illegal license pooling to a greater extent than residents (Tr. 237) and that the state expends efforts in search and rescue operations for nonresidents who tend to get lost more than residents. In both cases, no systematic cost figure was presented. (Tr. 266). In both cases, it was admitted that because nonresidents use outfitters to a greater extent than residents, the actual per capita problems posed by the nonresident hunter might well be less than the problems posed by the average resident hunter. (See Tr. 266).

One of the most forceful arguments presented by Montana related to the increased costs of tracking down and prosecuting nonresident violators who often escape the state before the investigation culminates. (Tr. 235, 236). Again, there were no concrete cost figures presented. The prosecutions of nonresidents beyond the state borders under the Lacey Act are relatively few ("between 10 and 20 violations" [per year]). (Tr. 270).

Furthermore, most game violations are misdemeanors. (Tr. 263). There would

likely be a large percentage of nonresident game violation defendants who would forfeit bond rather than remain in the state or return to the state to resist the charges in Court. (See Tr. 264, 265).

Given this lack of concrete evidence, it is seriously questionable whether the nonresident actually imposes <u>any</u> additional per capita law enforcement cost whatsoever!

The consulting economist for Plaintiffs calculated the actual level of conservation-related tax expenditures borne by residents and not borne by nonresident hunters. Lacking any concrete evidence of any increased enforcement cost posed by nonresidents, she performed a "sensitivity test"--<u>i.e.</u> she assumed for the sake of the analysis that nonresidents cost twice as much as residents per hunter for enforcement. (Tr. 62).

Viewed in light of the evidence, the economist's assumption for the sake of her calculations of a 2-1 enforcement cost differential appears very

generous.[23]

Plugging this 2-1 enforcement cost ratio into fee calculations, and considering the conservation-related expenditures borne by Montana taxpayers but not by nonresidents, she calculated that any fee differential of greater than 2.5-1 (nonresident to resident) would violate the standards of Toomer and Mullaney. (See, Section 2, below).

The evidence on the question of whether nonresidents pose additional enforcement costs (per capita) on the state indicates that they pose very little, if any.

(2) The magnitude of the Montana license fee differential far exceeds a reasonable compensation factor for conservation-related taxes borne only by residents

Only a very small percentage (approximately 2%) of the revenues used to support the operations of the Montana Fish and Game

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[23] The Wildlife Management Institute Study, "Report to the Western Association of State Game & Fish Commissioners on Nonresident Hunting and Angling", July, 1971; Plaintiffs' Exhibit No. 7, assessed the added cost of enforcement per nonresident hunter at a factor of only 0.5; i.e. the enforcement cost for non-resident vis-a-vis resident was assumed to be 1.5-1; p. 15.

Department is derived from the general fund of the state (i.e. through state taxes). (Plaintiffs' Exhibit No. 1. Governor's Executive Budget--Fish & Game Section). Some income is received from snowmobile registration, motorboat registration, and the Federal Government. (Id.) The great bulk of the revenues however, come from license fees. (Id.) Two-thirds of the license revenue is derived from nonresident contributions. (Tr. 34).

This is significant because the question here involves the extent to which nonresidents can be charged for licenses to reimburse the state for resident-borne tax assessements which relate to game preservation and management. The plain fact is that the resident of Montana pays very little for the operation of the Fish and Game Department. Indeed, the contribution to the Montana Fish and Game Department from the Federal government is larger than the contribution to that Department from the general fund of Montana. (See Plaintiffs' Exhibit No. 1). That is not to say, of course, that there are not other taxes paid by residents which either directly or indirectly support wildlife. These are considered below.

The consulting economist for Plaintiffs presented an extensive analysis of these direct and indirect expenditures. She approached the question by analyzing the expenditures of the State of Montana which related either directly or indirectly to the provisions of the service (game management). She then approached the pricing problem for the services by dividing the expenditures of the state relating to its hunting activity into "direct costs (expenditures)" and "indirect costs (expenditures)". (See Plaintiffs' Exhibit No. 4). Direct costs were defined as those "costs which would not occur if the Government did not produce the service (variable costs)". (Tr. 54). (Example of a "direct cost": "The cost of law enforcement associated with the hunting privilege"--i.e. game warden, Tr 55). The economist took the direct cost figure and divided it by the total number of hunters to get an average-hunter price per license. (Tr. 55, 56).

The economist then treated the issue of "indirect costs"--i.e. "expenditures by the State of Montana which would occur whether or not the state was in the business of licensing hunters. They are the overhead, if you will, or the fixed costs of operating State Government", (Tr. 57)

(example--maintenance of general law and order--Tr. 57). Such expenditures obviously benefit nonresident hunters to a certain degree--but they also benefit everybody else and would be spent regardless of whether the state involved itself in game management.

The economist calculated the number of person-days spent by hunters in Montana as a percentage of person-days spent by residents (who also enjoy the benefits) and then applied that percentage to the entire tax-supported budget of the State of Montana (on the generous assumption that the nonresident hunter receives some benefits from all state expenditures.[24] (See Tr. 56-57). For the nonresident, she added these costs onto the direct license cost derived (residents presumably already pay for these indirect expenditures by their tax contributions). The resulting figure was the correct (albeit wholly generous) fee for the nonresident license (i.e. the fee which would

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[24]This is a generous assumption because there are obviously state expenditures for services nonresidents do not use--e.g. mental institutions, schools, etc.

compensate the state for tax-related conservation expenditures made by residents for conservation expenditures--and in fact, for all expenditures of the state).

However, because there were contentions by the State of Montana that nonresidents cost the state more per hunter for law enforcement, and because such additional costs would be direct costs resulting from the State's game management activities, Dr. Schaill doubled the direct license attributable cost vis-a-vis the nonresident. (See this brief, pp. 77, 78).

Even given these assumptions, generous to the state,[25] the economist concluded that the average hunter license fee differential between nonresident and resident hunters should be approximately 2.55-1.

This analysis is remarkably close to the ratio derived in the "Report to the Western Association of Game and Fish

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[25]And after adjusting her figure of nonresident hunter-days spent in Montana to meet the (legitimate) objections of the Defendants--that her initial analysis had used incorrect figures. (Tr. 405).

Commissioners on Nonresident Hunting and Angling", prepared by the Wildilfe Management Institute, July, 1971 (Plaintiffs' Exhibit No. 7). That report calculated that the cost to the Western States of providing hunting is about three times as high for nonresidents as residents. (Plaintiffs' Ehxibit No. 7, p. 15). For good measure, and to give the states the benefit of the doubt, the report reached a recommendation of a 1-5 ratio (resident fee to nonresident fee):

> RECOMMENDATIONS
>
> 1. That nonresident license fee differentials to hunt any species in the western states be reasonable. Reasonable is defined as the general ratio of 1 to 5 between resident and nonresident fees which existed in the 37 non-western states in 1971. Thus, it is recommended that nonresident hunting fees be no greater than five times the amount a resident would have to pay for the same privileges. (P. 22).

Obviously, the license fee differential in Montana grossly exceeds these ratios.

Defendants attempted to impeach the analysis of Plaintiffs' economist by arguing that she underestimated the "direct" costs attributable to game management. An extensive treatment of that criterion is not warranted here. However, it should

be noted that the economists testifying for the state engaged in admittedly erroneous methodologies which greatly overestimated the direct costs attributable to game management. For instance, Bill Long, economist for the state, prepared a statement which attempted to calculate "direct" expenditures of the State of Montana by Departments other than Fish and Game. In doing so, Long included the entire tax-supported expenditures of agencies such as the Water Quality Bureau, the Air Quality Bureau and the Forestry Division as direct costs for fish and game purposes. Upon cross-examination, Mr. Long admitted:

> ...I guess I'd have to say that it isn't reasonable for an economist to do that. ... (Tr. 353).

The State's other economist, Dr. Copeland, agreed that Mr. Long's approach was not proper:

> Q. [Goetz] And I assume you agree with Mr. Long that it is not reasonable from an economist's standpoint to attribute the full 100 percent of the Water Quality Bureau budget to the activities of fish and game?
>
> A. [Copeland] Yes, I agree with that.
>
> (Tr. 381)

Additionally, the state, through the testimony of Long and Copeland, argued that "opportunity costs" can legitimately be considered in justifying the license fee differential. (Tr. 369, 315). The argument is that Montanans sacrifice economically in foregone economic opportunities in order to provide good environment for wildlife habitat. Upon examination it was unclear whether they could be sure that Montanans actually suffered any real deprivation vis-a-vis citizens of other states. (Tr. 376). No systematic relation was made between such lost "opportunity costs", if any, and the magnitude of the license fee differentials. For instance, Dr. Copeland testified:

> Q. [Goetz] Now my understanding is that you did not make a flat statement that the differential in the license fees under the Montana system either for 1975 or 1976 is justified in your standpoint?
>
> A. [Copeland] I made no statement either way.
>
> Q. [Goetz] You don't purport to hold that position one way or another, do you?
>
> A. [Copeland] That's correct.
>
> (Tr. 390, 391).

Significantly at no time did Defendants make

any systematic application of its arguments or data to the magnitude of the differential here in question.

When questioned regarding the appropriateness of including "opportunity cost" in calculating license fee differentials, Dr. Copeland admitted that he had little real authority for reaching his conclusions:

> Q. [Goetz] OK. Do you have any examples that have done that rather directly on the lines that you have testified to, that is, to reimburse for foregone capital income?
>
> A. [Copeland] I can think of none.
>
> Q. [Goetz] Do you have any authority for the proposition that those opportunity costs, those foregone costs should be included in the pricing of this kind of licensing system?
>
> A. [Copeland] My experience as an economist.
>
> Q. [Goetz] Anything else?
>
> A. [Copeland] No.
>
> (Tr. 382, 383).

Plaintiffs' economist testified that it is not proper for a state to try to charge nonresidents for coming into the state "to pay back their lower incomes and lack of economic development, it would appear to me to be a restriction on free travel by tourists, by people in the United States.

If we attempted to do that, it would appear equally absurd and possibly even illegal." (Tr. 402).

Indeed, this appears to be precisely the type of abuse that the privileges and immunities clause was designed to prevent.

For these reasons, the District Court's finding was correct that the state could not reasonably justify the discrimination on a cost basis.

CONCLUSION

As the privileges and immunities clause makes clear, participation in the Federal Union is a two-way street. Montana reaps significant hunting-related benefits from the substantial Federal lands in the state. (Tr. 40). For fiscal year 1973, Montana was apportioned $1,105,387.80 from the Federal Government under the Pittman-Robertson Act[26] for wildlife restoration. Only seven states received more (all, except Alaska, with substantially larger populations than that of Montana). (Plaintiffs' Exhibit No. 6, Table 2). In 1972, Montana's share of the Federal tax burden was $606,150,000.00 (44th largest). For the same year, its share of the Federal tax

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[26] 16 U.S.C. 669, et seq.

outlays was $1,092,313,219.00 (39th largest).[27]

The "Report to the President and to the Congress by the Public Land Law Review Commission", One Third of the Nations' Land, (June, 1970), made the following recommendation:

> Nonresident Discrimination
>
> Recommendation 67: State policies which unduly discriminate against nonresident hunters and fishermen in the use of public lands through license fee differentials and various forms of non-fee regulations should be discouraged. (P. 174).

If Montana is to be part of a nation of states; if Montanans are going to continue to use, free of charge, the Federal lands within the State (to take 75% of the elk taken in the state [A. 57]); if the Montana Fish and Game Department is going to continue to accept an inordinate share of Pittman-Robertson funds, then it must accept the concomitant obligations of Federal citizenship. The state must simply exercise its police power within the limits of the Federal Constitution.

Appellants respectfully submit that the decision of the District Court should

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[27] Barone, et al., The Almanac of American Politics, 1974, Gambit, Boston, p. 574.

be reversed.

Respectfully submitted this 6th day of April, 1977.

GOETZ & MADDEN

By James H. Goetz
JAMES H. GOETZ
P. O. Box 1322
Bozeman, Montana 59715
Attorney for Appellants

CERTIFICATE OF MAILING

I, JAMES H. GOETZ, hereby certify that on this 6th day of April, 1977, I served true and correct copies of the above and foregoing Brief of Appellants, upon the following counsel of record, by depositing same in postage prepaid envelopes, addressed to the following addresses:

Paul A. Lenzini
Chapman, Gadsby, Hannah & Duff
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Clayton R. Herron
Attorney at Law
P. O. Box 783
Helena, Montana 59601

James H. Goetz
JAMES H. GOETZ